

**In the Supreme Court of the United States**

**October Term, 1902**

**THE UNITED STATES APPELLANT,**  
**EDWARD P. BLISS, DIRECTOR OF DENIAL,**  
**McKay, Respondent.**

**No. 204.**

**APPEAL FROM THE COURT OF CLAIMS.**

**BRIFE FOR THE UNITED STATES**

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1898.

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THE UNITED STATES, APPELLANT, <i>v.</i> EDWARD P. BLISS, EXECUTOR OF DONALD McKay, deceased.	}	No. 394.
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APPEAL FROM THE COURT OF CLAIMS.

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**BRIEF FOR THE UNITED STATES.**

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## **STATEMENT OF THE CASE.**

On August 22, 1863, the appellee's testator, Donald McKay, contracted to build an iron double-ender paddle-wheel gunboat, afterwards called the *Ashuelot*, for the Navy Department, the vessel, with its machinery, appurtenances, equipment, and outfit, to be completed in eleven months from the date of the contract. The contractor built the vessel as agreed, and was paid the full contract price for the work (Rec. 13, 14). Changes and additional work were ordered from time to time during the construction of the vessel, for which he was paid \$25,407.54.

On account of these changes and additional work, and also on account of other delays for which the Navy Department was responsible, the completion of the vessel was delayed from July 22, 1864, the date fixed by the contract, to November 29, 1865 (Rec. 14). During the period of eleven months within which the vessel was to have been completed according to the contract there was a considerable advance in the prices of labor and material, so that the cost of the vessel to the contractor was materially increased over what it would have been had there been no delay. This advance in prices reached its maximum on or before July 22, 1864, when the contract period of eleven months expired, and no further advance occurred between that date and the date of final completion of the vessel (Rec. 14, 15).

The private act of August 30, 1890 (26 Stats., 1247; Rec. 11), authorized the appellee to file a claim in the Court of Claims for further compensation for the construction of the side-wheel steamer *Ashuelot*, and gave the said court full jurisdiction to hear and determine and render judgment upon such claim. The liability of the United States was, however, limited in the said act by certain provisos, among which are the following:

*Provided, however,* That the investigation of said claim shall be made upon the following basis: The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building the light-draft monitors *Squando* and *Nauset* and the side-wheel steamer *Ashuelot* in the completion of the same, by reason of any changes or alterations in the plans and specifications required and delays in the prosecution of the work: *Provided,* That such additional cost in completing the same,



and such changes or alterations in the plans and specifications required, and delays in the prosecution of the work, were occasioned by the Government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid.

After hearing the case, the Court of Claims, on April 18, 1898, found that the cost of changes and extra work over and above what had been paid therefor was \$4,153.05; the additional cost for superintendence, clerks, etc., occasioned by the delay, \$5,480.06; the additional cost for insurance occasioned by the delay, \$1,917.97; the increased cost of labor, \$12,608.71; and the increased cost of material, \$14,815.66. Judgment was accordingly entered for all of the above items, making a total of \$38,975.45, whereupon the United States took this appeal. (Rec., 15.)

#### **ASSIGNMENTS OF ERROR.**

The court below erred:

1. In holding the appellant liable, under the private jurisdictional act, for the whole cost of the labor employed and material purchased by the contractor after the expiration of the contract term over what such labor and material would have cost had the vessel been completed within that term, although no further advance in the price of labor and material occurred after the expiration of the contract term.

2. In entering judgment, in favor of the appellee, for \$38,975.45 instead of \$11,551.08.

## BRIEF OF ARGUMENT.

This appeal is not directed to all the items which make up the amount of the judgment rendered against the appellant. The jurisdictional act warrants an allowance for the cost of changes and extra work, the increased cost to the contractor for the pay of superintendence, ~~the~~ clerks, etc., after the time when the vessel should have been completed, and the increased cost due to the outlay for insurance after that period. The features of that part of the judgment to which this appeal relates consist of the allowances for the increased cost of labor and material. The only question at issue, therefore, is the meaning of a portion of the jurisdictional act, reading as follows:

*Provided, however,* that the investigation of said claim shall be made upon the following basis: The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building \* \* \* the sidewheel steamer *Ashuelot* in the completion of the same, by reason of any \* \* \* delays in the prosecution of the work: *Provided,* That such additional cost in completing the same, \* \* \* and delays in the prosecution of the work, were occasioned by the Government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid.

The language of the jurisdictional act in regard to claims for advance in the price of labor and material is definite and positive. It provides expressly that "no

allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid." In the present case the vessel was to have been completed, according to the contract, by July 22, 1864, but was not actually completed until November 29, 1865. The "prolonged term for completing the work rendered necessary by delay resulting from the action of the Government" was therefore the period of sixteen months and seven days from July 22, 1864, to November 29, 1865, and the jurisdictional act forbids any allowance for any advance in the price of labor or material unless such advance occurred during that period. The court below has found explicitly that the advance in price of labor and material occurred during the contract period of eleven months, that is, before July 22, 1864, and that after that date there was no further advance, the increased price continuing "without material change until the completion of the vessel, sixteen months and seven days subsequent to the expiration of the contract period." (Rec. 15.) It is therefore submitted that the allowances of \$12,608.71 for increased cost of labor and \$14,815.66 for increased cost of material were not warranted by the jurisdictional act.

This precise point was decided by the Court of Claims in the very similar case of *Lawrence v. United States* (32 C. Cls. R., 245). In that case the original contract was made June 2, 1863, and the vessel was to be completed February 2, 1864. Subsequently this contract was annulled and another one for the construction of the same

vessel was entered into between the same parties on November 3, 1863, the vessel to be completed by July 3, 1864. Owing to delays for which the Navy Department was responsible, the vessel was not completed until October 4, 1865. Suit having been brought under a private jurisdictional act, the language of which was precisely similar to that of the jurisdictional act in the present case, the Court of Claims held that recovery could only be had under the second contract—that of November 3, 1863. It found, however, that there had been a great advance in the price of the labor and material entering into the vessel between February 2, 1864, the date when the vessel should have been completed under the first contract, and October 4, 1865, the date of actual completion, but that none of that advance in price occurred after July 3, 1864, when the vessel should have been completed under the second contract. The contractor, even under the second contract, had incurred great expense in the contract work on account of the advance in the price of labor and material before July 3, 1864, but the court held that he was not entitled, under the jurisdictional act, to recover for such increased cost of labor and material, because there had been no advance in prices after the expiration of the contract term. Nott, C. J., said:

The theory upon which the previous cases [certain other cases previously decided under similar special acts] were decided was this: The court regarded the contract as giving to the builder a period of eight months within which he was bound to construct and complete the vessel, and to the Government, reciprocally, the same period of eight months



within which it was not responsible under the statute "for any advance in the price of labor or material." The "prolonged term for completing the work," in the opinion of the court, began when the eight months expired. \* \* \* The second contract bore date November 3, 1863; consequently the period of eight months expired on the 3d day of July, 1864. If that was the date on which the liability of the Government began, the claimant should recover nothing for increased cost of labor or increased cost of material. \* \* \* The statute contemplates a term within which the builder had to run the risks of increased cost of a rising market, and it designates another term of changes, alterations, and delays during which the Government would be responsible for the enhanced market price of labor and material. Manifestly, the one term must end before the other term could begin.

The questions therefore remain: During what period did the Department hinder and delay the work? During what period was there a rise in the prices of labor and material? \* \* \* The court must hold that the term for completing the work for which the Government is responsible began at the expiration of the term of the second contract, to wit, on the 4th of July, 1864.

The doctrine above stated applies exactly to the present case. Here the Government had a period of eleven months, from August 22, 1863, to July 22, 1864, "within which it was not responsible, under the statute, 'for any advance in the price of labor or material.'" The "prolonged term for completing the work began when those eleven months expired, i. e., on July 22, 1864, and thereafter no 'advance in the price of labor or material'" occurred.

It is therefore manifest that the decision of the court below in the present case, wherein no opinion has been filed, involves a positive overruling of the decision of the same court made in the Lawrence Case and explained in the opinion in that case.

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It is to be observed that in the Lawrence Case the court's decision as to the Government's liability for the advance in the price of labor and material, occurring during the prolonged term only, has nothing whatever to do with its decision as to which contract could be sued on, except only ~~the~~ matter of amount. The findings are silent as to any advance in price during the period within which the vessel was to have been completed under the first contract, but ~~say~~ that "between the 2d of February, 1864, when it was originally contemplated, under the contract of June 2, 1863, that the vessel should be completed, and October 4, 1865, the date of her completion, there was a great advance in the price of labor and material entering into the vessel;" and further that "if the claimant is legally entitled to recover for the prolonged term beginning at the expiration of the period of eight months from the date of the contract of June 2, 1863, to wit, on the 3d day of February, 1864, the following is the additional cost incurred." (32 C. Cls. R., 253.) Whether the figures actually given by the court as the increased cost of labor and materials be correct or not can not now be inquired into, but it is indisputable that the court must have understood those figures as giving the amount of the advance in price occurring after February 2, 1864, as the findings are absolutely silent as to any advance before that date. Had the decision

upheld the first contract, then the amount recovered for the advance in price would, upon these findings, have been for an advance over the prices current on February 2, 1864, the day before the prolonged term began.

It is perfectly true that a provision for payment for the advance in the price of labor and material occurring "during the prolonged term for completing the work," i. e., an advance over the prices current on the day when the vessel should have been completed, does not give full compensation for the extra cost due to delay caused by the Government, and that in the present case such a provision cuts out \$27,424.37; and it is equally true that Congress might have omitted any restriction as to the period during which the advance for which the claimant was to recover must have occurred. For this reason it was contended in the court below (and successfully, as the judgment shows) that Congress must be understood to have provided for full compensation to the claimant for *all* his losses in building the vessels, provided those losses were due to the action of the Government, and therefore that the act must be construed to warrant a judgment for advances in the price of labor and material occurring "during and within the period of the contract," or, in other words, that the expression "the prolonged term for completing the work" is equivalent to "the period which was required for completing the work, which period was prolonged," an expression which would entitle the claimant for all advance in the price of labor and material over what the price would have been had the vessel been completed within the contract term.

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The most obvious objection to this contention is that it makes the proviso absolutely meaningless and superfluous. The words of the statute, "the additional cost which was necessarily incurred by the contractors for building \* \* \* the side-wheel steamer *Ashuelot*, in the completion of the same, by reason of any \* \* \* delays in the prosecution of the work \* \* \* occasioned by the Government of the United States," can not possibly be understood to cover any additional cost due to any rise in the price of labor and material *not* occurring during the period when the vessel was under construction—the period beginning with the execution of the contract—nor as failing to cover any such additional cost for any portion of the vessel over what that portion would have cost had there been no delay. These words insure full compensation for all additional cost necessarily incurred on account of delay, and they cover no more than this. So that if Congress wished to grant full compensation on that account these words of the statute sufficed.

It is a fundamental rule of statutory construction that effect must be given, if possible, to every word and clause, so that nothing shall be left devoid of meaning or destitute of force. (Black on Interp. of Laws, 166; Cooley's Const. Lims., 72.) This rule is too familiar, as well as too obvious, to call for argument in its support; and yet the decision of the court below can not be reconciled with this rule. That decision necessarily involves giving to the words "but no allowance for any advance in the price of labor or material shall be considered unless such ad-

vance occurred during the prolonged term for completing the work rendered necessary by delay" the same effect as if they had been "but no advance in the price of labor or material shall be considered unless such advance occurred during the period when the vessel was under construction," a phrase which in no way differs in effect from that already found in the statute, viz, "the court shall ascertain the additional cost which was necessarily incurred by the contractors, by reason of any delays." It is submitted that no construction of the clause in regard to the allowance for the advance in the price of labor and material, which makes it a mere repetition, in slightly different words, of what the statute has already said, can possibly be sustained.

Another objection to the appellee's contention is that the language of the proviso does not admit of such a construction. The clause which relates particularly to the advance in the price of labor and material begins with the word "but," which indicates that the clause is intended to introduce something different from what has preceded it—to modify in some particular the effect of the preceding clause. Then the word "term" is used, which means a particular, definite period of time, "a space or period of time to which limits have been set" (Century Dict.), and the words "prolonged term" must refer to a period distinct from what may properly be called the "original term," or "contract term," i. e., the period referred to in the contract for the vessel itself as "eleven months from the date of this contract" (Rec. 4) and also as "the time stipulated" (Rec. 5). The words

"prolonged term for completing the work," too, indicate that this "prolonged term" was necessary in order to complete a work which had already been begun.

The only reason that can be suggested for giving to the words "during the prolonged term for completing the work" a construction which renders ineffective and superfluous the clause in which they stand is that Congress must be presumed to have intended to give full compensation to the parties to whom this act applied; but it is submitted that Congress was granting to these parties something to which their contracts did not entitle them, and that it may well have seen fit to limit its bounty. As whatever these parties acquired under this statute was by the bounty of Congress, the mere fact that such bounty stopped short of full compensation for their losses involved no absurdity or injustice. There is, therefore, no reason for departing from that primary rule of statutory construction that where there is no uncertainty or ambiguity the letter of the statute must govern.

In *Sturges v. Crowninshield* (4 Wheat., 122, 202) it was contended that the constitutional prohibition of State laws impairing the obligation of contracts could not have been intended to apply to such insolvent laws as had been passed by the colonial and State legislatures from the earliest times, although such laws produced the forbidden result. Marshall, C. J., however, said:

Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for

which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision not contradicted by any other provision in the same instrument is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application. This is certainly not such a case.

Further citation of authority in support of this familiar doctrine would be clearly superfluous, especially as this court has but recently declared itself upon the point in the following words:

It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. (*United States v. Goldenberg*, 168 U. S., 98, 103.)

In the present case there is no convincing reason to suppose that the letter of the statute did not "fully and accurately disclose the intent" of Congress, but only a theory on the part of the appellee that greater liberality was intended than the letter of the statute would permit. Moreover, the act now under consideration was a private

one, granting to two parties, or their representatives, special rights of suit against the United States, and waiving the legal defenses which the United States had made in another suit, brought by another party on a precisely similar contract (see *McCord v. United States*, 9 C. Cls. R., 155), as well as the defense of the statute of limitations. Such an act, being a special grant of privileges, should be construed strictly against the grantees. *Hannibal and St. Joseph R. R. Co. v. Missouri River Packet Co.* (125 U. S., 260); *Coosaw Mining Co. v. South Carolina* (144 id., 550).

It is therefore submitted that the judgment of the court below should be reversed, with instructions to enter a judgment for the sum of \$11,551.08 only, being the amount found due for changes and extra work, superintendence, clerks, etc., and insurance.

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